DRAFT – 09/27/93

BILL CONCEPTS/OPTIONS WITH LICENSING

(The fees and penalties set forth below are illustrative only. Penalties are set forth separately with each prohibition but may be grouped together instead. Proof of age requirements also are set forth separately with each pertinent prohibition but also may be grouped together instead. Additional sections may be required to amend or repeal existing laws.)

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Section 1. *Title.*

This Act shall be known and may be cited as the "Prevention of Youth Access to Tobacco Act of 1994."

Sec. 2. *Purpose.*

The purpose of this Act is to reduce the access of persons under the age of 18 years to tobacco products by establishing a system for the licensing of persons who sell tobacco products at retail (either over-the-counter or by vending machines) and persons who distribute tobacco product sampling, strengthening existing prohibitions against the sale

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and distribution of tobacco products to persons under the age of 18 years, prohibiting the purchase or receipt of tobacco products by such persons, limiting the sale of tobacco products through vending machines and the distribution of tobacco product samples in public places, prohibiting the sale of tobacco products other than in unopened packages, providing for training of retail sales clerks and random, unannounced inspections of locations where tobacco products are sold or distributed, providing for the report required to be submitted to the United States Department of Health and Human Services pursuant to Section 1926 of the Public Health Service Act (42 U.S.C.300x-26), and ensuring uniform regulations for the sale, distribution, advertising and promotion of tobacco products within this state.

Sec. 3. *Definitions.*

(a) "Agency" means [the agency vested with licensing authority under this Act].

(b) "Person" means . . .

(c) "Proof of age" means a driver's license or other generally accepted means of identification that describes the individual as 18 years of age or older and contains a photograph or other likeness of the individual and appears on its face to be valid.

(d) "Public place" means any public street, sidewalk or park, or any area open to the public in any publicly owned or operated building.

(e) "Sample" means a tobacco product distributed to members of the public at no cost for the purpose of promoting the product.

(f) "Sampling" means the distribution of samples to members of the public in a public place.

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(g) "Tobacco product" means any product that contains tobacco and is intended for human consumption.

Sec. 4. *Retail Sale Licenses.*

(a) No person shall engage in the retail sale of tobacco products on or after July 1, 1994, unless the person is authorized to do so by a license issued pursuant to this section, or is an employee or agent of a person who has been issued a license pursuant to this section. For purposes of this section, the person deemed to be engaged in the retail sale of tobacco products through a vending machine shall be the owner of the business establishment in which the vending machine is located.

(b) The annual license fee for the retail sale of tobacco products is as follows:

(i) Fifty dollars ($50.00) for each place of business where tobacco products are sold over the counter at retail. A separate license shall be required for each place of business where tobacco products are sold over the counter at retail.

(ii) Thirty-five dollars ($35.00) for each vending machine. A separate license shall be required for each vending machine through which tobacco products are sold.

(c) Every application for a license under this section shall be made upon a form provided by the Agency and shall set forth the name under which the applicant transacts or intends to transact business, the location of the place of business or vending machine for which the license is to be issued, and any other identifying information as the Agency may require.

(d) Every license issued by the Agency pursuant to this section shall be valid for one year from the date of issuance and shall be renewed upon application except as

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otherwise provided in this Act. Upon notification of a change of address if required by the Agency, a license shall be reissued for the new address without the filing of a new application.

(e) On or before May 1, 1994, the Agency shall notify every person who engages in the retail sale of tobacco products, including retail sale through vending machines, of the license requirements imposed by this section.

(f) The Agency shall issue a license or renewal of a license within 30 days of receiving a properly completed application and the applicable license fee. A license or renewal thereof shall not be withheld or denied except pursuant to Section 11; provided, however, that no license shall be issued for the sale of tobacco products through a vending machine unless the applicant certifies compliance with the restrictions set forth in Section 5(a) with respect to the machine for which the license is issued. No terms or conditions shall be imposed for the issuance, maintenance, or renewal of a license except as specified in this Act.

(g) A person who engages in the retail sale of tobacco products without a license as required by this section, or after a license issued pursuant to this section has been suspended or revoked, is subject to an action brought by the Agency of one hundred dollars ($100) for a first violation within a two-year period and two hundred dollars ($200) for any second or subsequent violation within a two-year period. No person shall be liable for more than one violation per day.

(h) A license issued under this section is not assignable and is valid only for the person in whose name it is issued and for the place of business or vending machine

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designated therein. No license other than the license required under this section shall be required for the retail sale of tobacco products.

Sec. 5. *Vending machine sales.*

(a) *Location restrictions.*

It shall be unlawful for any person to sell tobacco products through a vending machine unless the vending machine is located:

(i) In areas of factories, businesses, offices or other places that are not open to the public;

(ii) In places that are open to the public but to which persons under the age of 18 years are not admitted;

(iii) In places where alcoholic beverages are sold for consumption on the premises, but only if the vending machine (A) is under the continuous supervision of the owner or lessee of the premises or an employee thereof, and (B) is inaccessible to the public when the establishment is closed;

(iv) In other places, but only if the machine (A) is under the continuous supervision of the owner or lessee of the premises or an employee thereof, (B) can be operated only by the activation of an electronic switch by the owner or lessee of the premises or an employee thereof prior to each purchase, and (C) is inaccessible to the public when the establishment is closed.

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(b) *Proof of age.*

In any place where supervision of a vending machine, or activation of an electronic switch, is required by subsection (a), the person responsible for that supervision or the activation of the switch shall demand proof of age from a prospective purchaser if an ordinary person would conclude on the basis of appearance that the prospective purchaser may be under the age of 18 years.

(c) *Penalties.*

A person who maintains a tobacco vending machine in violation of subsection (a), or fails to demand proof of age as required by subsection (b), is subject to an action brought by the attorney for the municipality in which the vending machine is maintained. Such violation shall be punishable by a fine of one hundred dollars ($100).

Sec. 6. *Sampling licenses.*

(a) No person shall engage in tobacco product sampling on or after July 1, 1994, unless that person is authorized to do so by a license issued pursuant to this section, or is an employee or agent of a person who has obtained a license. If a person contracts with a tobacco product manufacturer to distribute samples of the manufacturer's products, that person shall be deemed to be the person engaged in sampling for purposes of this Act. Employees of a tobacco product manufacturer may be licensed individually to engage in sampling on behalf of the manufacturer, but those employees shall not be required to obtain individual sampling licenses if the manufacturer is licensed to engage in sampling.

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(b) The annual license fee for a tobacco product sampling license shall be fifty dollars ($50). Every application for a license under this section shall be made upon a form provided by the Agency and shall set forth the name, address and telephone number of the applicant. Every license issued by the Agency pursuant to this section shall be valid for one year from the date of issuance, shall entitle the holder to engage in tobacco product sampling at any lawful location in this state during the license term, and shall be renewed upon application except as otherwise provided in this Act. A tobacco product sampling license shall not be required to distribute tobacco product samples in a place of business for which a license to sell tobacco products over the counter at retail has been issued pursuant to section 4.

(c) The Agency shall issue a license or renewal of a license within 10 days of receiving a properly completed application and the applicable license fee. A license or renewal thereof shall not be withheld or denied except pursuant to Section 11; provided, however, that no sampling license shall be issued unless the applicant certifies compliance with the restrictions set forth in Section 7(a). No terms or conditions shall be imposed for the issuance, maintenance, or renewal of a license except as specified in this Act.

(d) A person who engages in tobacco product sampling without a license as required by this section, or after a license issued pursuant to this section has been suspended or revoked, is subject to a civil penalty in an action brought by the Agency of one hundred dollars ($100) for a first violation with a two-year period and two hundred dollars ($200) for any second or subsequent violation within a two-year period. No person shall be liable for more than one violation per day.

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(e) A license under this section is not assignable and is valid only for the person in whose name it is issued. No license other than the license required under this section shall be required for tobacco product sampling.

Sec. 7. *Distribution of samples.*

(a) *Location Restrictions.*

(i) It shall be unlawful for any person to distribute tobacco product samples in any public place; provided, however, that this prohibition does not apply to sampling (A) in an area to which persons under the age of 18 years are not admitted, (B) in or at a store where tobacco products are sold at retail, or (C) at or adjacent to a production, repair, or outdoor construction site or facility.

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(ii) Notwithstanding paragraph (i), no person shall distribute tobacco product samples in or on any public street, sidewalk or park that is within 500 feet of any playground, school or other facility when the facility is being used primarily by persons under the age of 18 years.

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(b) *Proof of age.*

A person engaged in sampling shall demand proof of age from a prospective recipient if an ordinary person would conclude on the basis of appearance that the prospective recipient may be under the age of 18 years.

(c) *Penalties.*

A person who distributes tobacco product samples in violation of subsection (a), or fails to demand proof of age as required by subsection (b), is subject to an action brought

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by the attorney for the municipality in which the distribution occurs. Such violation shall be punishable by a fine of one hundred dollars ($100).

Sec. 8. *Out-of-package sales.*

(a) *Requirement.*

It shall be unlawful for any person to sell tobacco products other than in an unopened package originating with the manufacturer that bears the stamp required by the revenue code.

(b) *Penalties.*

A person who sells any tobacco product in violation of this section is subject to an action brought by the attorney for the municipality in which the sale occurs. Such violation shall be punishable by a fine of one hundred dollars ($100).

Sec. 9. *Minors; Signs.*

(a) *Sale or distribution to minors.*

(i) *Prohibition.*

It shall be unlawful for any person to sell or distribute any tobacco product to another person who has not attained the age of 18 years or to purchase a tobacco product on behalf of any such person; provided, however, that it shall not be unlawful to distribute a tobacco product to a family member or a personal acquaintance for noncommercial purposes, or to an employee when required in the performance of the employee's duties.

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(ii) *Proof of Age.*

A person engaged in the sale or distribution of tobacco products shall demand proof of age from a prospective purchaser or recipient if an ordinary person would conclude on the basis of appearance that the prospective purchaser or recipient may be under the age of 18 years.

(iii) *Penalties.*

(A) A person who violates paragraph (i) or (ii) is subject to an action brought by the attorney for the municipality in which the sale or distribution occurs. Such violation shall be punishable by a fine of one hundred dollars ($100) for the first offense within a two-year period, two hundred and fifty dollars ($250) for a second offense within a two-year period, and five hundred dollars ($500) for a third or subsequent offense within a two-year period. Proof that the defendant demanded, was shown, and reasonably relied upon proof of age shall be a defense to any action brought pursuant to this subsection.

(B) If the sale is made by an employee of the owner of a store at which tobacco products are sold at retail, the employee shall be guilty of the violation and be subject to the fine. If the sale is made through a vending machine, the proprietor of the establishment where the machine is located shall be guilty of the violation and be subject to the fine; provided, however, that if the proprietor has made an employee responsible for supervising the machine, such employee shall be guilty of the violation and be subject to the fine. If the tobacco product is distributed by an employee engaged in the business of sampling, the employee shall be guilty of the violation and be subject to the fine.

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(C) For purposes of determining the liability of a person controlling franchises or business operations in multiple locations for a second or subsequent violations of this subsection, each individual franchise or business location shall be deemed a separate entity.

(b) *Purchase or receipt by minors.*

(i) *Prohibition.*

It shall be unlawful for a person who has not attained the age of 18 years to purchase or accept receipt of a tobacco product, or to present or offer to any person any purported proof of age which is false, fraudulent, or not actually his or her own, for the purpose of purchasing or receiving any tobacco product; provided, however, that it shall not be unlawful for such a person to accept receipt of a tobacco product from a family member, from a personal acquaintance, or from an employer when required in the performance of such person's duties.

(ii) *Penalties.*

A person who violates paragraph (i) is subject to an action brought by the attorney for the municipality in which the violation occurred. Such violation shall be punishable by a fine of fifty dollars ($50) or 25 hours of community service work for a first offense, and a fine of fifty dollars ($50) and 50 hours of community service work for a second or subsequent offense within a one-year period.

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(c) *Signs.*

(i) *Requirement.*

On and after July 1, 1994, every person who sells tobacco products at retail over the counter shall post conspicuously and keep so posted at the place of business a sign, no smaller than ninety-three and one-half square inches, so as to ensure that it is likely to be read at each point of sale, stating the following:

STATE LAW STRICTLY PROHIBITS
THE SALE OF TOBACCO PRODUCTS
TO PERSONS UNDER THE AGE OF 18 YEARS
PROOF OF AGE MAY BE REQUIRED

(ii) *Penalties.*

Failure to post the sign as required by paragraph (i) shall be punishable by a fine of twenty-five dollars ($25) for the first offense within a two-year period and seventy-five dollars ($75) for each succeeding offense within a two-year period. No notice regarding tobacco products, other than the notice required by this subsection, shall be required to be posted or maintained in any store that sells tobacco products at retail.

Sec. 10. *Employees.*

(i) *Requirement.*

Every person engaged in the business of selling tobacco products at retail shall notify each individual employed by that person as a retail sales clerk that state law (A) prohibits the sale or distribution of tobacco products to any person under 18 years of age and the purchase or receipt of tobacco products by any person under 18 years of age, and (B) requires that proof of age be demanded from a prospective purchaser or recipient if

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an ordinary person would conclude on the basis of appearance that the prospective purchaser or recipient may be under the age of 18 years. This notice shall be provided before the individual commences work as a retail sales clerk, or, in the case of an individual employed as a retail sales clerk on the date when this subsection becomes effective, within 30 days of that date. The individual shall signify that he or she has received the notice required by this section by signing a form stating as follows:

> "I understand that state law prohibits the sale or distribution of tobacco products to persons under the age of 18 years and out-of-package sales, and requires that proof of age be demanded from a prospective purchaser or recipient if an ordinary person would conclude on the basis of appearance that the prospective purchaser or recipient maybe under the age of 18 years. I promise, as a condition of my employment, to observe this law."

Each form signed by such individual shall indicate the date of signature. The employer shall retain the form signed by each individual employed as a retail sales clerk until 120 days after the individual has left the employer's employ.

(ii) *Penalties.*

Any employer failing to comply with the requirements of this subsection with respect to any employee shall upon conviction be punished by a fine of one hundred dollars ($100) for the first offense within a two-year period and two hundred dollars ($200) for each succeeding violation of this provision within a two-year period, or by imprisonment for not more than 30 days.

Sec. 11. *Suspension, revocation, denial, and nonrenewal of licenses.*

(a) Upon finding that a licensee, or an employee or agent of the licensee, has been determined by courts of competent jurisdiction to have committed during the license

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term two or more violations of this Act involving the same place of business or vending machine for which the license was issued, or the same holder of a tobacco product sampling license, the Agency shall notify the licensee in writing, served personally or by mail, that any subsequent violation thereof during the license term many result in an administrative action to suspend the license for a period not to exceed 30 days.

(b) Upon finding that a further violation has occurred during the license term notwithstanding the notice provided under subsection (a), involving the same place of business or vending machine for which the license was issued, or the same holder of a tobacco product sampling license, the Agency may initiate an administrative action to suspend the license. If an administrative action is initiated, the Agency shall immediately notify the licensee in writing of the initiation of the action and the reasons therefor, and permit the licensee an opportunity, at least 14 days after written notice is served personally or by mail upon the licensee, to show why suspension of the license would be unwarranted or unjust.

(c) The Agency may initiate an administrative action to revoke a license that previously has been suspended under subsection (b) if during the license term a further violation of this Act is committed involving the same place of business or vending machine for which the license was issued, or the same holder of a tobacco sampling license. If an administrative action is initiated, the Agency shall immediately notify the licensee in writing of the initiation of the action and the reasons therefor, and permit the licensee an opportunity, at least 14 days after written notice is served personally or by mail upon the licensee, to show why revocation of the license would be unwarranted or unjust.

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(d) The Agency may refuse to grant or renew a license under this Act to any person determined by courts of competent jurisdiction to have committed three or more violations of this Act during the year preceding the date on which the license or renewal application is filed with the Agency. Before refusing to grant or renew a license under this Act, the Agency shall give the applicant an opportunity, at least 14 days after written notice is served personally or by mail upon the applicant, to show why the denial or nonrenewal would be unwarranted or unjust.

(e) A person whose license has been suspended or revoked pursuant to this Act shall pay the Agency a fee of fifty dollars ($50) for the renewal or reissuance of the license. For purposes of determining the liability of a person controlling franchises or business operations in multiple locations for a second or subsequent violations of this Act each individual franchise or business location shall be deemed a separate entity.

(f) A licensee shall not be subject to any fine, civil penalty, or suspension, revocation, denial, or nonrenewal of a license by reason of violations of this Act that are committed by employees or agents of the licensee if the licensee affirmatively demonstrates that the licensee had taken reasonable steps prior to the time of those violations to prevent those violations by employees or agents.

(g) A licensee may seek judicial review of an action of the Agency suspending, revoking, denying or refusing to renew a license under this Act by filing a complaint in the Superior Court. A complaint shall be filed within 30 days after the date on which notice of the action is received by the licensee. The right to seek judicial relief shall not be

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affected by the failure to seek reconsideration by the Agency. The substantial evidence standard of review shall apply.

Sec. 12. *Unannounced inspections; Reporting and compliance.*

(a) *Unannounced Inspections.*

(i) The attorney general, acting through the sheriffs of the several counties and the chiefs of police of the several counties and cities, shall enforce this Act in a manner that can reasonably be expected to reduce the extent to which tobacco products are sold or distributed to persons under the age of 18 years, and shall annually conduct random, unannounced inspections at locations where tobacco products are sold or distributed to ensure compliance with this Act. The attorney general shall rely, to the fullest extent possible, on the police authorities of local governments in enforcing this Act. License fees and fines collected pursuant to this Act shall be used to offset the costs of its enforcement.

(ii) Persons under the age of 18 years may be enlisted by such sheriffs or chiefs of police, or employees thereof, to test compliance with this Act; provided, however, that such persons may be used to test compliance with this Act only if the testing is conducted under the direct supervision of said sheriffs or chiefs of police, or employees thereof, and written parental consent has been provided. Any other use of persons under the age of 18 years to test compliance with this Act or any other prohibitions of like or similar import shall be unlawful and the person or persons responsible for such use shall be subject to the fines prescribed in subsection (a) of Section 9.

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(b) *Reporting and Compliance.*

The attorney general shall prepare for submission annually to the Secretary of the United States Department of Health and Human Services the report required by Section 1926 of the federal Public Health Service Act (42 U.S.C. 300x-26), and otherwise shall be responsible for ensuring the state's compliance with that provision of federal law and any implementing regulations promulgated by the United States Department of Health and Human Services.

Sec. 13. *Statewide uniformity.*

No county, city, department, board, or other political subdivision or agency of the state may (a) impose any requirements or prohibitions pertaining to the sale, distribution, advertising, sampling, promotion or display of tobacco products in addition to those set forth in this Act or (b) limit competition (by means of coupons, discounts, promotional allowances, premiums or otherwise) between or among tobacco product manufacturers, vending machine operators or retailers that is lawful under the laws of the United States and the laws of this state. Notwithstanding any other law, all ordinances, by-laws and regulations or a county, city, department, board or other political subdivision or agency of the state imposing such requirements or prohibitions or such limitations are declared to be null and void and are hereby repealed.

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Sec. 14. *Severability.*

If any provision of this act or its application to any person or circumstance is held invalid, this shall not affect other provisions or applications of this act that can be given effect without the invalid application and to this end the provisions of the act are severable.

Sec. 15. *Effective Date.*

This Act shall become effective on March 1, 1994.

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